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Supreme Court of the United States

OCTOBER TERM 1940

No. 439

UNITED STATES OF AMERICA,

Respondent,

against

HAROLD VAN RIPER,

Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN S. WISE, JR.,
Attorney for Petitioner,
135 West 16th Street,
New York, N. Y.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, by his attorney, John S. Wise, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case August 12, 1940.

Questions Presented

1. Whether or not a definitely imposed sentence, specifying a definite time of beginning and ending, execution of which was suspended, can be vacated lawfully after its period has terminated, and seven years after the expiration of the term of court at which it was imposed.

2. Whether or not a former probationer, duly discharged from probation, can be incarcerated law-

fully without indictment and trial by jury for acts alleged to have transpired after the expiration of the maximum five year period of probation imposed by the sentence and permitted by the Probation Act.

3. Whether or not a former probationer can be lawfully arrested after the expiration of the maximum period of probation permitted by statute, and the expiration of the maximum period for which originally he might have been sentenced.

4. Whether or not a court lawfully can enforce a sentence under an invalid indictment which states no crime.

Statement

The appeal was from a judgment, page 26, made by Judge Knox on October 9, 1939, revoking petitioner's previously expired five year probation, vacating specific sentences definitely imposed by Judge Knox upon petitioner on June 30, 1932 under certain counts 9 to 16 inclusive of indictment No. C-88-665 (which sentences had expired previously by lapse of time), and adjudging anew: that petitioner be imprisoned for eighteen months on said Count 9, and, consecutively thereto, for concurrent periods of five years on each of said Counts 10 to 16 inclusive, that execution of said new sentences on Counts 10 to 16 inclusive be suspended, and that petitioner be placed on a new period of probation for five years to commence at the expiration of said new sentence on said Count 9.

The appeal was duly taken October 13, 1939.

The judgment of the Circuit Court of Appeals for the Second Circuit now sought to be reviewed was made August 12, 1940, page 299.

There were before the courts below the present record (hereinafter referred to as PR), and, PR page 152, petitioner's Exhibit B, the entire record on appeal in *U. S.* v. *Van Riper,* 99 F. (2) 816 (hereinafter referred to as 99R),

in which case, on the facts and the merits, the Court below had reversed a previous order of the District Court revoking petitioner's probation. The present record, page 294, also contains a stipulation that both parties may refer to the record on appeal in *U. S.* v. *Van Riper,* 92 F. (2) 1020; certiorari denied, 58 S. Ct. 521 (hereinafter referred to as 92R).

Those records show that in 1908 petitioner was employed by Francis E. Hamilton, Esq., former Solicitor to the Collector of Customs at New York, became a lawyer, and continued with him 22 years until his death about 1930 (99R, f. 462), except for the period during the world war when petitioner served in the military forces of the United States. Petitioner is married, resides with his wife (99R, f. 332), is 51 years of age, and for about 20 years prior to his indictment in 1932 was a practicing lawyer in State and Federal Courts. His reputation and associations, socially and professionally, were and are good (99R, ff. 472-502).

History of the Case

On May 25, 1932, an indictment in 17 counts was returned against petitioner and two co-defendants in the U. S. District Court for the Southern District of New York (99R, pp. 7-47). Counts 1 to 8, inclusive, charged violation of Section 23 of the Naturalization Act (34 Stat. 603; U. S. C., Title 8, Sec. 414). Counts 9 to 16, inclusive, charged subornation of perjury (Criminal Code, Sec. 126; U. S. C., Title 18, Sec. 232), and Count 17 charged conspiracy to violate the Naturalization Act (U. S. C., Title 18, Sec. 88). The other defendants entered pleas of guilty before trial. The petitioner entered a plea of not guilty but after two and one-half days of trial he withdrew his plea of not guilty on June 16, 1932 and pleaded guilty.

On June 30, 1932 petitioner was sentenced by Judge Knox under a judgment reading as follows (PR, p. 9):

"Counts 1 to 8 inc.—3 years on each count to run concurrently. Count 17—Two years to run concurrently with Counts 1 to 8 inc. Counts 9 to 16 inc.—Five years on each count to run concurrently and to commence at the expiration of sentence imposed on Counts 1 to 8 inc. and Count 17. Sentence on Counts 9 to 16 inc. suspended. Defendant placed on probation for a period of 5 years. Sentence to be executed at a penitentiary to be designated by the Atty General. Atlanta, Ga. Sentence to date from June 30, 1932. Prisoner to be held in Detention Hdqtrs NYC for 30 days."

Petitioner commenced service of *that* sentence June 30, 1932 and was both incarcerated and on probation thereunder until August 29, 1933.

On August 29, 1933 he was released on parole under application sponsored by Honorable Robert F. Wagner, Royal S. Copeland, John W. Davis, and Carl E. Whitney, with the provisions that his parole advisor should be his friend, former Deputy Assistant U. S. Attorney General Daniel P. McDonald, and that he would be employed by the Custom House Brokerage office of A. F. Cofod & Co., Inc., in New York (99R, ff. 462-463).

In September, 1933 he was so employed by said company, which was the Customs Broker and Forwarder for Twentieth Century-Fox Film Corporation, Gaumont British Pictures, and similar organizations (99R, f. 396).

Petitioner's probation continued, and, in addition, he was on parole under said sentence until about October 15, 1934 when, he having conformed with its conditions, the parole terminated and he was duly discharged therefrom.

Petitioner's parole having thus terminated, on October 29, 1934 he sought an order in said District Court directing the Government to show cause why he should not be granted permission to withdraw his plea of guilty and enter a plea of not guilty and why the judgment of conviction should not be vacated and set aside (92R, p. 29).

In the affidavit supporting this motion (92R, pp. 22-29) he stated that he was absolutely innocent of any and all the charges; that there was no crime charged in the indictment to which a true plea of guilty could have been made; that prior to his incarceration he had been for upwards of twenty years a reputable member of the bar and that as a consequence of his plea he had been disbarred; that his only hope of redemption in his civil, political, and social status lay in the court's granting permission to withdraw the plea of guilty and to allow him to "go to trial" (92R, p. 28). He further stated in effect, that while his plea of guilty was entered upon advice of counsel, the plea was made while he was under the fear and stress of threats of the District Attorney, communicated to him, that two young women in his employ would be indicted for perjury; that under this intimidation he was in such anxiety that he did not comprehend the grievousness of the consequences of entering such plea (R92, p. 27). The Assistant United States Attorney who had charge of the prosecution denied by affidavit, any intimidation (92R, pp. 30-31). Affidavits by the two young women supporting petitioner's statement are printed in the record (92R, pp. 34-35). The order to show cause prayed for was issued by the District Court (92R, pp. 20-21), which denied the motion February 16, 1935 (92R, p. 36).

In the spring of 1935 petitioner learned that one Louis Fried, an attorney and former U. S. Naturalization Examiner, was to be indicted on facts similar to those set forth in petitioner's indictment, and, instead of appealing the said decision of Judge Knox, he decided to await the outcome of the Fried case in the hope that it would bring forth an interpretative ruling by the U. S. Circuit Court of Appeals and/or this Honorable Court helpful to all parties concerned (PR, f. 660).

Prior to Fried's trial petitioner co-operated with Government Counsel (PR, f. 659) and loaned him a copy of the brief used on the motion to vacate his own conviction.

Further, petitioner's attorney, John S. Wise, Jr., Esq., was retained by Fried to prepare, brief and argue the motion to quash Fried's indictment (identical with petitioner's) as not stating facts constituting crimes. Mr. Pindyck's unit filed a brief in opposition to said motion to quash in which it said (R92, f. 220):

> "It is true there is no reported case refuting the defendant's contention and sustaining the Government on the question at bar, * * *."

In November, 1935 Fried was convicted, sentenced to 3 years imprisonment and appealed from the judgment of the U. S. District Court for the Eastern District of New York. On February 18, 1936 Fried's appeal No. 14564 was dismissed by the U. S. Circuit Court of Appeals, Second Circuit, on a consent signed by Fried, Deputy Assistant U. S. Attorney General Pindyke and the U. S. Attorney for the Eastern District of New York. Thereafter Fried's 3 year penitentiary sentence was vacated and he was resentenced to 47 days in New York Federal Detention Headquarters (PR, f. 661) by Government consent.

In the early part of 1936 evidently alarmed by the legal implications of the Fried case, an emissary of Mr. Pindyke's Immigration Investigation Unit called upon Edmund Kilroe, Esq., Counsel for Fox Film Corporation, and asked him whether or not he knew petitioner had been convicted of a crime. Mr. Kilroe discussed the matter with Mr. Cofod, petitioner's employer, with the result that his said employment was terminated through no fault of his own, except, possibly, that he had made, and intended to make, vigorous efforts to vacate his judgment of conviction (99R, ff. 367-368). Meanwhile, petitioner continued on probation.

Early in 1937 petitioner told Probation Officer Dean that he soon expected a substantial sum from a receivership estate for services rendered in 1931 and 1932 while he was

a practicing lawyer, which, together with funds derived from his World War adjusted compensation, would enable him to renew his effort to vacate his judgment of conviction and carry it all the way to this Honorable Court, if need be (PR, f. 663).

Almost immediately thereafter, on April 13, 1937, while petitioner and his counsel were in course of preparation of the motion papers for re-argument of said motion to vacate the judgment of conviction, petitioner was wantonly attacked by means of a probation revocation proceeding brought at the instance of said Pindyke's Immigration Unit on the sole charge that he "had been engaged in fraudulent immigration matters." The Circuit Court of Appeals finally found and held therein that said matters had been so instigated, that they had arisen incidentally while petitioner was employed by Cofod & Co., that they were in no sense fraudulent, that petitioner had referred the persons involved to attorneys and other persons of good standing, and that his own character and reputation had continued to be good. *U. S.* v. *Van Riper,* 99 F. (2) 816.

Interim, having failed to secure a pardon as suggested by Judge Knox in 92 F. (2) 1020, on April 21, 1937 petitioner moved for reargument of his previously denied motion of October 29, 1934, and for an order to quash, set aside, and dismiss the indictment and to vacate and set aside the conviction, judgment and sentence on the ground that no crime was charged (92R, pp. 37-91), which motion was denied July 6, 1937 (92R, p. 92) without opinion.

On July 9, 1937 petitioner appealed to the Circuit Court of Appeals (92R, p. 93). That court, without opinion, affirmed the decision of the District Court (92R, p. 108), and thereafter this Honorable Court denied certiorari, 58 S. Ct. 521.

Meanwhile, petitioner was paroled under the probation violation charge, the probation proceedings were stayed and it was not until the end of March 1938 that hearings were held before Judge Hulbert, who, on May 13, 1938 made an

order revoking petitioner's probation (99R, f. 751). Petitioner duly appealed from said order, and, as aforesaid, the Circuit Court of Appeals reversed same on the facts and the merits with a full opinion, 99 F. (2) 816.

The Government did not petition for certiorari to review 99 F. (2) 816, and time to do so has expired. Instead, on December 12, 1938 it submitted to Judge Coxe a proposed order on mandate (PR, p. 11) containing a provision as follows:

> "FURTHER ORDERED, ADJUDGED AND DECREED that the probation of the defendant is reinstated and that he is placed on probation for the remainder of the probationary period ordered in his original sentence."

Thereupon, petitioner submitted to Judge Coxe a memorandum (PR, p. 16) showing that his five year period of probation, the maximum period under the sentence and the statute, had expired June 29, 1937, and that in view of his assignment of error number seven to that effect (99R, f. 783) the Circuit Court of Appeals had so held in reversing Judge Hulbert's decision and order in toto. Accordingly, Judge Coxe declined to sign the Government's proposed order, but did sign and file petitioner's proposed order dated December 12, 1938, which made the mandate of the Circuit Court of Appeals the judgment of the District Court (PR, p. 12). The Government did not appeal the said order of Judge Coxe.

Thereafter, believing that his probation difficulties were over, and in conformity with the suggestion of Judge Knox in his memorandum opinion of February 16, 1935 (92R, p. 36) petitioner resumed his efforts to secure a pardon from the Executive, but became satisfied that his efforts were blocked by the immigration authorities (PR, f. 672).

Further, immediately after his said vindication by the Circuit Court of Appeals, petitioner secured the representation of the Fur Importers and Exporters Association, Inc.

on questions of customs duties and trade agreements with foreign countries. He also secured the representation of a number of property owners before an administrative body, on a question involving riparian rights. He also secured the management of five residential properties, one apartment site and a waterfront commercial site for an old friend of nearly twenty years' standing (PR, f. 668).

About March, 1939 petitioner sublet an office in the Paramount Building, New York from a man who was a certified public accountant, specializing in accountancy, but who also was a lawyer. Less than a month thereafter the man informed petitioner that he had been called to the Bar Association and told to terminate petitioner's tenancy, notwithstanding they had no business interests in common except the tenancy (PR, f. 669).

March 10, 1939, notwithstanding the said decision of the Circuit Court of Appeals and the order of Judge Coxe thereon, Chief Probation Officer Sweet notified petitioner (PR, f. 50) that he would have to return to probation.

Therefore, on March 17, 1939, on a full affidavit (PR, f. 40), petitioner formally moved the District Court for an order discharging him from probation. Said motion came on for hearing before Judge Hulbert who, after oral argument by both parties, made an order dated March 31, 1939 (PR, f. 67):

> "ORDERED, that the period of probation of the defendant Harold Van Riper having terminated, he is hereby discharged from any and all further supervision by the probation officer of this court."

The Government did not appeal this order.

Thereafter, having been driven previously from the Paramount Building, where his landlord had been a lawyer, as aforesaid, petitioner sublet an office in the Bowery Savings Bank Building at 110 E. 42d Street, New York from a commercial concern, so that, as he vainly hoped, he would be free from molestation (PR, f. 669). He entered upon this tenancy May 1, 1939.

The Instant Proceedings

On May 10, 1939 petitioner learned from Immigration Unit Chief Pindyke (PR, f. 670) that on May 6, 1939, instead of appealing Judge Hulbert's said order discharging petitioner from probation, and in direct and utter disregard thereof, Probation Officer Sweet had made an "Affidavit for Order of Arrest" (PR, p. 24) praying for revocation of suspension of execution of the sentence imposed upon petitioner June 30, 1932; and that an order for arrest was made May 6, 1939 (PR, p. 29), wherefore, on May 10, 1939, petitioner voluntarily surrendered and was arraigned for violation of probation. He denied such violation (PR, p. 30) and was released in the custody of his counsel.

Thereafter petitioner made formal motion (PR, p. 31) for an order to vacate the aforementioned order for issuance of warrant and the warrant issued thereon and asked to be discharged from custody, which motion was denied by Judge Knox (PR, p. 39).

Subsequently hearings were held before Judge Knox in June, 1939 (PR, pp. 44-201), and resulted in his opinion No. 12373 dated August 16, 1939 (PR, p. 201), that petitioner had violated his probation. Thereafter, before judgment was rendered, signed or filed by Judge Knox on October 9, 1939, petitioner duly made formal motion October 4, 1939 (PR, pp. 204-245) to reopen the hearing to enable him to produce additional evidence. This motion was denied and exception duly taken (PR, pp. 258).

The Affidavit for Order of Arrest

The affidavit for order of arrest (PR, p. 24), which is dated May 6, 1939, a considerable time subsequent to Judge Hulbert's order discharging petitioner from probation, omits any reference to the fact that petitioner's period of probation had expired June 29, 1937 or that Judge Hul-

bert's order had been made. The affidavit sets forth 9 alleged violations of the terms of probation. For the sake of clarity we arbitrarily number these charges 1 to 9 inclusive.

The following five of said charges were the entire subject matter of the order of Judge Hulbert which was reversed by the Circuit Court of Appeals in *U. S.* v. *Van Riper,* 99 F. (2) 816. Such reversal was followed by a District Court order making the mandate of the Circuit Court of Appeals the order and judgment of the District Court. The Government made no application for certiorari. The law of this case as to these five charges is established by said decision and stands undisturbed. Further, these five charges are the only ones contained in the instant petition which relate to alleged acts of petitioner within the probation period, which terminated June 29, 1937. In consequence, upon the hearing before Judge Knox, evidence in connection with these charges was objected to on the ground that the matters were res judicata, and a dismissal of the entire proceeding was demanded. Judge Knox reserved decision on the objection and demand (PR, p. 44), took said evidence and, as appears from his opinion (PR, p. 201), was improperly prejudiced thereby.

CHARGE 1

That in November, 1935 petitioner violated the laws of Canada by procuring three aliens to be smuggled into Canada.

CHARGES 2 AND 3

That in February, 1936 petitioner went to Hamilton, Ontario and McAdam Junction, New Brunswick, without permission of the probation officer.

CHARGE 4

That about March (actually February) 29, 1936, petitioner misrepresented himself to the Canadian authorities as an attorney-at-law.

CHARGE 5

That for the purpose of obtaining permission to make a West Indian trip (in March, 1936) petitioner falsely represented to the probation officer that the trip was for pleasure and not for business.

Notwithstanding the foregoing five charges are res judicata, as aforesaid, we respectfully submit the following brief resumé of the facts relevant thereto:

On or about June 30, 1935, while employed by Cofod & Co., as aforesaid, Mr. Auditore, an old friend of petitioner and of Mr. Cofod, introduced petitioner to an Italian couple Mr. Albertario and Mrs. Carola (99R, f. 332). They informed him that they were being sought by the immigration authorities. Petitioner immediately referred them to John W. Henderson, a former U. S. Vice Consul of good repute, who, later on that same day, surrendered them to the Immigration authorities at Ellis Island and had them released under bond (99R, f. 339). Thereafter, when the couple needed counsel to appear before the Secreary of Labor's Board of Appeal and Review in Washington, petitioner referred them and Mr. Henderson to Isaac L. Stewart, Esq., a Washington attorney of good standing, with whom petitioner had collaborated on matters for Cofod & Co., Fox Film Corporation, Gaumont-British Pictures, etc. (99R, f. 341). In the deportation proceedings it developed that the couple had worked diligently, established a good home and were the parents of an American-born child, wherefore they were given permission to depart voluntarily at their own expense in lieu of deportation so that they would be eligible to secure visas and re-enter lawfully. Such permission was under Respondent's Exhibit 12 herein, a letter of the Department of Labor dated September 25, 1935 and was to be exercised prior to November 1, 1935 (PR, f. 868).

In said deportation proceedings the couple had freely admitted that they never had performed a formal marriage

ceremony, because Mrs. Carola was uncertain as to whether her former husband was living or dead (R99, f. 360). Therefore, it was desirable that Mrs. Carola should secure a divorce and formally marry Mr. Albertario, the father of her son, so they could leave the United States as husband and wife and apply to a nearby American Consul abroad for immigration visas for lawful re-entry. Accordingly, in September, 1935 petitioner consulted Mr. Charles Mangiaracina, a title expert in the Law Department of the City of New York, whom he had known for some years, with the result that he and/or his cousin, Vito Tittone, a Brooklyn attorney (99R, f. 355) secured a Mexican divorce for Mrs. Carola about November 7, 1935 (99R, f. 719). Although the conduct of both Mangiaracina and his cousin Tittone was perfectly ethical in and about the Mexican divorce proceeding, for some unknown reason Mangiaracina sought to deny his connection therewith. However, the physical exhibits in 99 F. (2) 816 absolutely belie such denial.

In October, 1935 (PR, f. 376), while the Carola divorce proceeding was pending, a friend of Mr. Cofod introduced petitioner to one Walter Fast, who had entered the United States informally as a seaman and subsequently married a lawfully resident alien woman. Fast desired to leave the United States, secure an immigration visa and re-enter lawfully to resume his residence with his wife in the home they had established therein. Petitioner referred Fast to former U. S. Vice Consul John W. Henderson for such purpose (99R, f. 388).

Mrs. Carola's divorce was secured early in November, 1935, as aforesaid, and she and Mr. Albertario were then formally married in New Jersey.

Therefore, the Albertarios and Fast were in readiness to proceed to Canada to secure immigration visas from an American Consul for lawful re-entry into the United States. This was to be accomplished under the general practice in

vogue among travel bureaus and lawyers handling immigrations matters (PR, ff. 486-489), as follows:

Secretary of Labor Perkins had previously designated the cases of more than two thousand deportable aliens, as "hardship cases", on the theory that their deportation would work hardship on relatives who were citizens or lawfully resident aliens (the Albertario child is a native-born citizen and Fast's wife is a lawfully resident alien), and had granted them permission to depart voluntarily in lieu of deportation so they would not be debarred from applying for lawful readmission to rejoin their said relatives. To facilitate such applications for readmission a practice was officially established as follows:

(a) If the alien was the wife, husband, minor child or parent of a citizen, the citizen would execute a petition for the issuance of a visa to the alien. The Secretary of Labor would approve the petition and forward it to the Secretary of State. He, in turn, would transmit it to a designated American Consul in Canada. The alien then would forward his birth certificate and other documents to said consul to show his origin, good character and unlikelihood of becoming a public charge. If the consul was satisfied as to such facts he would notify the alien that he or she could appear at the consulate at a specified time to make formal, personal application for visa. Then, equipped with the consular letter of appointment, the alien would go to an immigration station near his home and secure from it a letter addressed to the Canadian immigration authorities guaranteeing to them that if, for any reason, the American Consul should refuse a visa to the alien, the American immigration authorities would readmit said alien, visa or no visa.

(b) If the alien was not such a relative of a citizen or legally resident alien, then, of course, no petition could be made to the Secretary of Labor. However, the State De-

partment permitted such aliens to forward their birth certificates, police records and documents showing financial resources directly to American Consuls in Canada for preexamination. If such consuls were satisfied with the alien's showing they formally notified the alien of a date on which he or she could personally appear at the consulate to make formal application for visa. In these cases, however, the American immigration authorities issued no letters to the aliens guaranteeing to the Canadian immigration authorities that they would be readmitted in any event, visa or no visa. Nevertheless, upon the arrival of such aliens at American consulates in Canada they almost invariably received visas, and when they presented themselves and such visas to American immigration officials at the border they were lawfully readmitted, without any question as to how they had entered Canada.

The foregoing practice was so thoroughly examined into and commented upon on December 9, 1937 at pages 42 to 46 of "House Hearings on 1939 State Department Appropriation Bill", on January 27, 1938 at pages 250 to 258 of "House Hearings on 1939 Labor Department Appropriation Bill", and in the daily press at those times, that the same is properly subject to judicial notice.

The Albertario and Fast cases fell into the second of the above categories, and, as stated above, they were in readiness to proceed to Canada early in November, 1935. At about that time a conference was held between Henderson, Mangiaracina and petitioner, and we refer to the testimony relating thereto. Folios 151-155 of the present record comprise folios 401-408 of the record in *U. S.* v. *Van Riper*, 99 F. (2) 816, but in reading them into the present record respondent omitted their preface (R99, f. 401):

> "Q. Now (Van Riper), with reference to this trip of Mr. Fast and the Albertarios to Canada, who made the arrangements for them to go to Canada? A. Well, Mr. Henderson, Mr. Mangiaracina and I talked it over together.

"Q. You talked it over together and what was the conclusion you reached as to the manner in which these individuals should go to Canada? A. It was decided that they would go by train as far as St. Albans, Vermont, and that from St. Albans, Vermont into Montreal they would go by taxicab."

Petitioner's testimony continued at 99R, folios 407-408:

"Q. Now, what arrangements, Mr. Van Riper, were made as to having these people picked up at St. Albans and taken to Montreal? Was a cab chartered to take this trip? A. Not that I know of.

"Q. No arrangements were made? A. No arrangements were made by me.

"Q. They were simply to take the train to St. Albans and hire a cab? A. So far as I understand, Mr. Mangiaracina handled that end of the matter.

"Q. They met Mr. Mangiaracina and that end of the matter was to be handled by Mr. Mangiaracina? A. Mr. Mangiaracina.

"Q. And you don't know, if any, what arrangements he made? A. No, I do not.

"Q. The tickets of the aliens would take them as far as St. Albans? A. Yes.

"Q. Was there some doubt in your mind, Mr. Van Riper, as to whether or not these individuals would be allowed entry into Canada? A. There was."

and at 99R, folio 432, he testified:

"Q. And it is your statement, Mr. Van Riper, that you did not procure the taxicab to take these parties illegally into Canada? A. Absolutely."

Mangiaracina, with Fast and the Albertarios, left for Montreal shortly after the middle of November, 1935, 99R, folio 431, from Pennsylvania Station, New York. As a government witness, Mangiaracina testified, R99, folio 520:

"Q. When you talked with those people at the railroad station did he ask you to smuggle these people into Canada? A. Oh, no.

"Q. Did he ask you to do anything irregular? A. Oh, no.

"Q. Or improper? A. Oh, no."

In due course Fast and the Albertarios reached Hamilton, Ontario, where they were joined by Mr. Henderson, who presented them to the American Consul there.

Fast remained in Hamilton until early February, 1936 when he received his visa from the American Consul and lawfully returned to the United States, 99R, folio 252.

Shortly after Fast's return to the United States, Mr. Alexander of the State Department informed petitioner in Washington that the Department would not recognize as valid Mrs. Albertario's Mexican divorce and her subsequent marriage with Albertario. Mr. Alexander stated, however, that if Mrs. Albertario would proceed to a jurisdiction requiring a short residence, like Cuba, would physically remain therein until she secured a new divorce, and would then remarry Albertario, the objections would be removed and they could receive visas, 99R, folio 370.

About the middle of February, 1936 petitioner went to Hamilton, Ontario to arrange with the American Consul for the journey of the Albertarios to Cuba, as suggested by the State Department, 99R, fol. 376. Petitioner testified, 99R, folio 381:

> "Incidentally, the Albertarios—I don't know about Fast, but I think he did too—had registered. The Albertarios had registered with the Canadian immigration office in Hamilton, Ontario, the fact they were temporarily residing there and had agreed that when they left there they would advise the Canadian officer of their departure. While I was there on that day I dropped in with Mr. Albertario on this Canadian officer and told him that they intended to leave within a day or two and that they would advise him of the means by which they departed, whether by train or vessel."

If petitioner had believed that Fast and the Albertarios were unlawfully in Canada, and that he was particeps criminis, he most certainly would not have entered Canada and visited the Canadian immigration authorities there with one of the allegedly smuggled aliens. This fact alone should dispose of charge number one.

Later in February, 1936 the Albertarios proceeded to Halifax, N. S., to embark for Cuba. Petitioner sought to join them at Halifax to assist them, but was denied admission to Canada at McAdam Junction, N. B. on February 29, 1936 by Canadian Immigrant Inspector Bottomley.

Respondent's charges 2 and 3 relate to petitioner's visits in February, 1936 to Hamilton, Ontario and to the Canadian border en route to Halifax without permission of the probation officer, which were considered and disposed of by the court below in 99 F. (2d) 816 (R., ff. 440, 444-445). They were made solely to facilitate the proper and lawful carrying out of instructions given petitioner by officials of the U. S. Department of State in the premises.

Respondent's charge 4 that on said Trip to McAdam Junction on February 29, 1936 petitioner misrepresented to Canadian Inspector Bottomley that he was a "lawyer" for Fox Film Corporation, was denied by petitioner with the suggestion that Bottomley had drawn the inference that he was a lawyer from his old passport which properly so characterized him, and from the fact that petitioner had told Bottomley that he had been doing some customs work for Fox Film Corporation, PR, ff. 501-504.

Respondent's charge 5 is that petitioner secured permission to make a West Indian trip by "the false statement that it was a vacation trip." The record in 99 F. (2d) 816 shows that it was primarily a vacation trip (ff. 446-450); that theretofore the Albertarios had retained new counsel at Halifax who arranged for them to go to Cuba (f. 295); that petitioner joined them on the vessel at Boston and traveled with them to Bermuda and thence to Nassau at his own expense (f. 297); that the Cuban law-

yer was secured by the Halifax lawyer (ff. 300, 306-309, 385-388). In other words, that petitioner's visit to the Albertarios' Cuban lawyer was for the ethical purpose of acquainting him with facts within petitioner's knowledge to facilitate the proper handling of their matter, and was merely incidental to his vacation and desire to join his wife in Florida, which he did. The present record shows nothing to the contrary.

Thereafter the Albertarios secured visa and lawful entry, after most searching investigation by U. S. Immigration and Consular officials.

Both Fast (R99, f. 258), and Mrs. Albertario (R99, f. 297) testified that petitioner had dealt with them honorably and decently throughout the long negotiations.

It is difficult, therefore, to assign anything but malice as the motive which impelled the Immigration Authorities to attack petitioner in these baseless probation revocation proceedings.

Neither Judge Knox in his opinion herein, PR, folio 603, nor the Court below in its opinion herein, PR, page 300, made any specific mention of the above 5 charges, undoubtedly treating them as res judicata under *U. S.* v. Van Riper, 99 F. (2) 816, in which the Court below fully considered and commented upon same, and vindicated petitioner thereunder, and petitioner's subsequent formal discharge from probation by Judge Hulbert (PR, f. 67).

Charges 6, 7, 8 and 9

Each of these charges alleges an act by petitioner subsequent to June 29, 1937 when the period and the conditions of his probation terminated under the sentence and the statute. After June 29, 1937 petitioner was subject only to the laws of society, not to the conditions of probation.

CHARGE 6

That in the proceedings before Judge Hulbert (in March, 1938, which resulted in the order thereafter reversed by 99 F-2, 816) petitioner testified falsely (in March 1938) in that he said that he did not procure the illegal entry into Canada of Fast, Albertario and Carola (Mrs. Albertario).

Baldly put, this is a charge that petitioner committed the crime of perjury before Judge Hulbert in 1938, after the conditions of his probation had ceased to be in force. If respondent really believed said charge, its remedy was by indictment of petitioner and his trial by jury, not by an attempt to resuscitate probation conditions long since expired, and to substitute innuendo and conjecture in an informal revocation proceeding for the facts required to be proved under the rules of evidence in a formal, fair and impartial trial by jury.

It is unsupported by any evidence.

It is to be noted from the foregoing resumé of facts relevant to charges 1 to 5, inclusive, that both petitioner and government witness Mangiaracina testified in the previous proceeding before Judge Hulbert that the arrangements for Mangiracina's journey to Canada with Fast and the Albertarios were made at a discussion between Mangiaracina, Henderson and petitioner just prior to that journey in November, 1935, and that neither of them testified with reference to any former trip made by Mangiaracina. Mangiaracina then further testified that petitioner had not asked him to smuggle the aliens into Canada or to do any other wrong thing. It is also to be noted that neither Mangiaracina nor petitioner could have known earlier than September 25, 1935 in the case of the Albertarios (the date the immigration authorities granted them permission to depart voluntarily in lieu of deportation, PR, f. 868), and late October 1935 in the case of Fast (petitioner first met Fast in October, 1935, PR, f. 376), that said persons, or

any of them ever would or could go to Canada to secure visas for lawful reentry into the United States.

The Government attempted to show that a trip made by Mangiaracina in the spring of 1935 to Montreal and St. Albans, Vermont, had been made for the purpose of prearranging the unlawful entry of the Albertarios and Fast into Canada. In the instant proceeding the District Attorney stated:

> "Mr. Delafield: I think, if your Honor please, this witness (Mangiaracina) had been rather confused. He has made two trips to St. Albans; the first one with no aliens and the second one with aliens" (PR, f. 295).

Government witnesses Mangiaracina and Lampman, and petitioner fixed the time of Mangiaracina's first trip as the spring of 1935 (PR, ff. 282, 335, 453), when Fast and the Albertarios were unknown to Mangiaracina and to this petitioner, and it was made solely on Mangiaracina's personal affairs.

Government's charge 6 is aimed solely at petitioner's testimony in 99 F. (2) at folio 432:

> "Q. And it is your statement, Mr. Van Riper, that you did not procure the taxicab to take these parties illegally into Canada? A. Absolutely."

The truth of this testimony is established by the testimony of Government witness Lampman, the taxi-driver, who testified that he had never seen and had never talked with petitioner. Also that he had never heard of petitioner until just prior to the instant proceeding in 1939, and that all his discussions and transactions were with Mangiaracina in 1935 (PR, ff. 335-338). Government witness Mangiaracina's testimony in the previous proceeding, and in the present proceeding (PR, ff. 321-325) also fully corroborates petitioner's said testimony.

In the opinion rendered herein by Judge Knox (PR, f. 603) he wrote anent this charge:

> "It is fairly certain, also, that he (petitioner) lied at the time he was before Judge Hulbert upon an application for the revocation of his probation."

In other words, Judge Knox, without having heard petitioner's testimony as given before Judge Hulbert, took it upon himself to say not that petitioner "perjured" himself before Judge Knox, but that petitioner "lied" before Judge Hulbert. Judge Knox does not even specify in what respect petitioner "lied", and we respectfully submit that the evidence shows that he did not lie in any particular. The Circuit Court of Appeals made no specific mention of the question involved in charge 6.

CHARGE 7

> That on various occasions between 1933 and May 6, 1939, petitioner associated with one, H. Ely Goldsmith, at that time twice convicted in the court below.

In 1924 or 1925, before Goldsmith had ever been convicted of a crime, petitioner, who was then a member of the bar in good standing (p. 158), acted as counsel in the Supreme Court of the District of Columbia, and other courts, in several test cases in which Goldsmith had caused petitioner to be retained with full previous knowledge and approval of the United States immigration authorities (p. 153).

Petitioner had no other contact with Goldsmith until after the Fall of the year 1937 (p. 218):

> "In the fall of 1937 Miss Faians informed deponent that at a recent meeting of the Federal Bar Association one Moe or Moisha Finkelstein, a member, had suggested that she give him her immigration business. Also that he was trying to get the Association to insti-

tute proceedings against one H. Ely Goldsmith for illegally practicing law in immigration cases, to the end that this business could be monopolized by lawyers. Deponent was vitally interested because with more than a quarter century of experience in matters relating to Customs duties, foods and drugs, corporate finance, legislative and administrative procedure, and kindred subjects, domestic and international, he was hoping to pursue a new career in such matters, but was not certain as to whether or not the preparation of briefs and other papers in connection with such matters constituted the 'practice of law'. Therefore, from that time on he kept in close contact with Goldsmith. In January, 1938, there was instituted in the Supreme Court, New York County, the action of 'John J. Bennett, Jr., as Attorney General of the State of New York, upon the relation of Federal Bar Association of New York, New Jersey and Connecticut against H. Ely Goldsmith' to restrain him from operating in the immigration field."

On April 13, 1938, *Bennett* v. *Goldsmith* was tried in the New York Supreme Court before Wasservogel, J., who from the bench dismissed the complaint on the merits (pp. 244-248) and rendered a decision consisting of twenty-seven findings of fact and six conclusions of law (all of which are printed at length in the record herein, pp. 242-246). The judgment entered thereon held unequivocally that Goldsmith's business of acting as consultant in immigration matters did not constitute the practice of law, was not criminal, but, on the contrary, was legal in all respects. The judgment was unanimously affirmed by the Appellate Division, June 24, 1938 (254 App. Div. 855) and by the Court of Appeals, February 21, 1939 (280 N. Y. 529). Petitioner, in such circumstances, believed that Goldsmith's activities were proper and legal.

In further attempt to support this charge the Government showed that early in 1938, while Goldsmith was in Cuba (p. 187), petitioner, whose office was on another floor

of the building where Goldsmith was located (p. 186), gave occasional advice to Miss Saltzman, Goldsmith's secretary, relating to matters then being handled by Goldsmith's office in his absence (p. 156). That petitioner performed these services without compensation and purely as an act of friendship is shown not only by petitioner's testimony (p. 187) but by that of Government's witness, Miss Saltzman, who testified that petitioner was not associated in business with or received compensation from Goldsmith (p. 89).

Respondent produced three witnesses: Steiner (pp. 56-61), Peters (pp. 61-64) and Richter (pp. 64-69; 90-92) who testified that during Goldsmith's said absence in the early part of 1938 they had conferred with petitioner at Goldsmith's office. Steiner testified that he handed petitioner on Goldsmith's behalf $50.00 and received a receipt therefor in Goldsmith's name (Exhibit 3, p. 282). Richter testified that petitioner had prepared an affidavit necessary for use by Goldsmith in Richter's case (Exhibit 10, p. 287). These Government witnesses testified that petitioner had emphatically advised them to tell the absolute truth in dealing with the government in the matters as to which they had conferred with petitioner on Goldsmith's behalf (pp. 60, 63, 91-92).

In petitioner's moving affidavit of October 4th, 1939, he solemnly swore,

> "In fact, on May 10, 1939, at a conference in the office of Sylvester Pindyke, head of the immigration investigation unit, the prime mover herein, Mr. Pindyke stated to deponent in the presence of John S. Wise, Jr., Esq., that it was too bad Goldsmith had ruined such a good business, that he had investigated Goldsmith's activities and *that he was satisfied that deponent was not implicated in any of his wrongdoing*" (f. 656). (Our Italics.)

On October 9th, 1939, respondent submitted to the Court an answering affidavit by said Sylvester Pindyck, dated

October 5th, 1938 (f. 759), in which he denied the foregoing. However, also on October 9th, 1939, both petitioner and his attorney, John S. Wise, Jr., Esq., in the course of argument of said motion before the Court below offered to file a reply affidavit by Mr. Wise contradicting Mr. Pindyck's said statement and fully corroborating petitioner with regard to said conversation had with Mr. Pindyck (ff. 765-766, 758) but Judge Knox arbitrarily refused to receive it, and neglected to take the deposition of Mr. Wise, who was then in his presence. Mr. Pindyck was an officer of the Court and his veracity had been directly challenged.

All of the foregoing verifies, and we here assert that the entire record will show, that the Government did not adduce even a shred of evidence that petitioner ever did an unlawful or improper act in connection or association with Goldsmith.

CHARGE 8

> During Goldsmith's said absence in Havana in the early part of 1938, appellant advised one, Sylvia Rosenberg to procure from a certain B. Cohen & Co. a letter falsely stating that she was employed by said firm and that appellant had prepared affidavits to be signed by Sylvia Rosenberg and one, Dora Rosenberg, falsely stating that Sylvia Rosenberg was then employed by B. Cohen & Co.

The opinion of Judge Knox (p. 202) reads in connection with this charge:

> "Indeed, upon the hearing before me, there was evidence that Van Riper counselled a young woman to make an affidavit containing false statements, in order to assist a member of her family to avoid certain laws and regulations pertaining to aliens. And this testimony there is no reason to doubt."

Let us review the testimony that Judge Knox found, "no reason to doubt". This consisted entirely of that of two

sisters, Sylvia and Esther Rosenberg, who were desirous of obtaining a visa for their brother. Sylvia testified (pp. 69-82), that she is an American citizen, that early in 1938 she visited Mr. Goldsmith's office and there discussed with petitioner the case of her brother, who was then in Havana seeking lawful entry into the United States. Sylvia further testified:

> "Q. Now, what papers was it that Mr. Van Riper told you that you would need? A. He told me that I would need a trust fund for my brother, and a letter where I worked, a letter from the union that I am a member of the union, and also a letter from the landlord that we have a rented place and pay rent regularly.
>
> "Q. When he told you he wanted a letter from your employer, what did you tell him, if anything? A. He told me to go down and ask for a letter and I told him I wasn't working there. Then he asked me to go down anyway, and I told him I have a friend that works there and I will try to get it through the friend, because I personally did not go down for the letter" (p. 72).

Esther never met or spoke to petitioner, but of her own initiative she smuggled herself into the United States some years before; was illegally here at the time of the hearing herein, and had been arrested by the Immigration Authorities months before the hearing (pp. 83-85). Esther testified, and it is apparently the fact that she was working for a certain B. Cohen & Co., that Sylvia asked her to get a letter from this company, and:

> "I went over to my boss and asked him should he do me a favor and give me a letter, that I want to bring over a brother from Europe, and my sister told me to make it 'to whom it may concern', and that is how I got the letter.
>
> "Q. And did he say that he would give you such a letter? A. Yes, he did."

"Q. And he dictated the letter to the secretary? A. Well, he just said that she worked and I wrote it down?

"Q. And you put your sister's name Sylvia in the letter instead of yours? A. That is right.

"Q. Then what did you do with the letter after that, Miss Rosenberg? A. I brought it home and gave it to my sister Sylvia" (p. 83).

Esther, therefore, deliberately lied to her boss when she told him her brother was in Europe, when actually he was in Havana, and tricked him by inserting Sylvia's name in the letter instead of her own. Esther is Sylvia's "sister", not the mere, casual "friend" whom Sylvia falsely testified she told petitioner would get the desired letter to the effect that she, Sylvia, was employed by Cohen & Co., as represented by her to petitioner, and as he believed. In other words, Esther shows that Sylvia deceived petitioner in that respect, at least.

Petitioner testified, page 191,

"Q. And you saw Miss Sylvia Rosenberg, the young lady who testified yesterday? A. I did.

"Q. Did she tell you, Mr. Van Riper, that she was not working? A. No, what she told me was that she had been working. She had been working for a concern for quite a period of time. She told me that things had been a little bit slack and that she had been laid off for a couple of weeks and that she expected to resume her work very soon, and I told her 'If you haven't terminated your work or your employment with that concern, go and get a letter stating the fact that you are employed there and that your position is a steady one', and she told me that it was merely a temporary layoff, and she went out and got the letter. I dictated the affidavit on the basis of facts that she gave me, and I dictated an affidavit for the signature of her mother, reciting similar facts based upon the statement that Sylvia Rosenberg had imparted to me."

Sylvia testified that she actually had been employed by Cohen & Co., PR, folio 229. On March 1, 1938, *after* she had seen and talked with petitioner on February 24th, PR, folio 212 she went to work for an employer other than Cohen & Co., PR, f. 233. This adventitious circumstance evidently was seized upon and misconstrued to bring about petitioner's downfall.

As shown, petitioner freely admitted that, believing Sylvia was then still actually employed by Cohen & Co., he told her to secure the letter in question. He also freely admitted preparing the affidavits of Sylvia and her mother, Dora, containing the averment as to employment, which Sylvia later claimed was false. Said affidavits contain another significant falsity—a direct averment that the said Esther Rosenberg was then residing in Lithuania, when in fact she was unlawfully residing in New York as aforesaid. This false averment only could have been made on the basis of misinformation given petitioner by Sylvia—again she deceived him. There is no claim made by Sylvia that petitioner told her to lie in this particular—her testimony shows that she went to great pains to keep from petitioner the fact that Esther was in New York.

Government witness, Mollie Saltzman, the only disinterested witness, testified that petitioner, at her request, dictated the Rosenberg affidavits to her after conversations with Sylvia Rosenberg, and she, Mollie Saltzman, procured the signing of them by the Rosenbergs and had them notarized by one Landau, and that petitioner knew nothing about the execution of said affidavits, and had nothing to do with the filing of them (ff. 262-267). Can a man be held responsible for the execution of false affidavits because he dictates them upon information from the perjurious affiant? It never has been so held.

Since the Rosenbergs were able to and did establish a $1,000 trust fund for the brother, and since the family was otherwise able to show that he would not become a public charge, it is unreasonable to believe that petitioner,

thoroughly versed in immigration matters, would advise them to secure a letter containing a false statement as to Sylvia's employment, a superfluity, and advise the making of false affidavits, thereby placing his own liberty in jeopardy at the mercy of absolute strangers to him. No pecuniary or other motive for him so to do was shown. That petitioner had powerful stimuli for careful and honest dealings and none for wrong doing, and that Sylvia and Esther had the converse, is apparent and glaring.

Throughout the previous proceeding (see record in *United States* v. *Van Riper,* 99 F. (2d) 816) Government witnesses Fast and Albertario, and in the proceedings herein its witnesses Steiner, Peters, Richter, Albertario and Fast testified that in their dealings with petitioner he had always instructed them to be truthful in all their dealings with the Government.

It is also certain that U. S. Immigration Attorney Pindyck knew all about this Rosenberg matter on May 10, 1939 when he stated to petitioner, in the presence of John S. Wise, Jr., that he had investigated all of Mr. Goldsmith's activities and was satisfied that petitioner was in no way implicated therein (f. 656).

Were this testimony uncontradicted, there is not only reason to doubt it, but every reason to completely disregard it. The bearers of this testimony are admittedly co-conspirators impelled by double motive: both have committed serious crimes against the Government, one by illegally entering the country and the other by aiding and abetting illegal sojourn here and by herself making and causing her mother to make false affidavits and presenting perjurious and false documents to the Government. We do not charge that Government agents promised Sylvia and Esther immunity from punishment for their criminal acts or promised that Esther would not be deported or that assistance would be rendered in keeping the brother in this country. However, this Court knows that a detected wrongdoer hoping for immunity or leniency endeavors to curry

favor from law enforcement authorities and we do not hesitate to state that it came naturally to those two women (admittedly guilty of perjury and criminality in their prior dealings with the Government) to commit further perjury on the hearing below in the hope, (1) that the brother would be permitted to remain here, (2) that Esther would not be prosecuted and deported and (3) that Sylvia and her mother would not be punished for their admittedly perjurious affidavits.

CHARGE 9

> That on or about December 1, 1937 (after petitioner's period of probation had expired) petitioner procured one, Caracololo, an alien illegally in the United States, to be smuggled into Canada and (p. 24) "that this entry into Canada constituted a criminal violation of the laws of the Dominion of Canada by Domenico Caracciolo and by the probationer Harold Van Riper", and that thereafter said Caracciolo was sentenced in Canada for illegal entry and was deported by the Canadian authorities to Italy.

On the face of the charge it appears primarily that the alleged wrong was committed not against our laws but against the laws of Canada.

The attempt to sustain same was based upon the testimony of Government witness, Anna Faians, who testified (pp. 138-143) that she is a practicing attorney-at-law; that she knew of petitioner's knowledge and experience in immigration matters and consulted him in connection with an immigration matter she then had pending on behalf of one, Caracciolo; and that as a result of such conference she arranged to engage counsel in Toronto, Canada, and for petitioner to accompany Caracciolo from New York to Buffalo. She procured her client to pay his own traveling expenses to Buffalo and she paid petitioner's round-trip transportation only to Buffalo. Petitioner's expired probation would not have been violated unless he left the

State of New York and went into Canada, folio 449. Petitioner denied that he had taken Caracciolo into Canada or that he himself had gone into Canada (p. 149).

The only evidence adduced by the Government that appellant went to Canada is the testimony of Miss Faians in answer to leading questions (p. 141):

> "Q. Did he (petitioner) tell you whether or not he had accompanied Mr. Caracciolo to Canada? A. He said he had. * * *"

To support Miss Faians' testimony the Government offered in evidence (Exhibit 1, pp. 271-281) an affidavit purporting to be made in Toronto by Caracciolo through an interpreter in the presence of H. R. Dean, U. S. probation officer (p. 46), but not in the presence of petitioner. Caracciolo was not produced on the hearing below. The admission of the affidavit was objected to (p. 48).

It fails completely to support the Government's contention that petitioner went into Canada.

It states in its pertinent portions that (p. 273) an alien friend of Caracciolo had entered the United States illegally, had been represented by Miss Faians and had recommended her to Caracciolo; that Caracciolo (p. 274) had given money to Miss Faians and in addition had deposited $300 in the bank in their joint names with the understanding that Miss Faians could have it if he obtained a visa; that Miss Faians (p. 274) told him to go to Canada and that petitioner would meet him at Grand Central Station; that Caracciolo and petitioner rode on the same train to Buffalo (p. 275) where thereafter an automobile pulled up, petitioner told Caracciolo to get into the car which petitioner did not enter (p. 276). This is the last mention in the Caracciolo affidavit (Exhibit 1) of any connection between him and petitioner. The affidavit continues, however, to state that thereafter Caracciolo arrived at some river, embarked in a row-boat, was rowed for some time,

took passage in some bus, thereafter was apprehended in Toronto by the immigration men for illegal entry, was sentenced to pay a fine of $200 or serve three months and that Miss Faians called to see him in Canada. It will be noted from Caracciolo's affidavit that there is no suggestion that petitioner entered Canada with him, but on the contrary that petitioner parted with him and left him in a taxicab at Buffalo whence he went to the river (pp. 276-277).

Petitioner admitted that he had left Caracciolo in Buffalo, not Canada, and denied that he left him in a taxicab, etc. as recited in the affidavit.

Petitioner testified (p. 148) that he suggested to Miss Faians and Caracciolo that Caracciolo proceed to the home of one, Rose Gable, a social welfare worker in Buffalo, who would see that he got to Mr. Reed, a member of the Canadian Bar in Toronto, and:

> "Then I conveyed that information to Miss Faians and after talking the thing out she thought it might be better not to have Mr. Caracciolo proceed alone and asked me if I would accompany him as far as the home of Mrs. Gable in Buffalo."
>
> "Q. And you did that? A. I did that."
>
> "Q. You did not go into Toronto? A. I did not. I did not go into any part of Canada."
>
> "Q. Did you have anything to do with putting Caracciolo across the border? A. I did not. Nothing more than I just testified."
>
> "Q. You delivered him to Mrs. Gable? A. I delivered him to Mrs. Gable" (pp. 148-149).

Improperly admitted government Exhibit 2 is a certificate showing said conviction of Caracciolo by a Toronto court for illegal entry into Canada. It makes no mention of petitioner as an accomplice or co-defendant. The only competent evidence that petitioner violated the laws of Canada would be a proper certificate to such effect from its courts, and there is none. The United States District Court had no jurisdiction to pass upon the facts and make

such a finding in the absence of such proof, if then.

Inasmuch as Judge Knox only admitted objectionable Exhibits 1 and 2 "subject to passing on their validity" (p. 143), and closed the hearings without so doing, and without having given petitioner proper opportunity to controvert any inferences raised thereby, petitioner promptly moved thereafter to reopen the hearings for the purpose, among other things, of confronting Miss Faians with documents and evidence in the possession of the Bar Association and the Emigrant Industrial Savings Institution which would belie her aforementioned testimony to the effect that petitioner had stated that he had gone into Canada with Caracciolo, and, on the contrary, would show (a) that she had never so contended in her conferences and lengthy correspondence with Mr. Reynolds of the Grievance Committee of the Bar Association, pp. 227-243, and (b) that the $300 which Caracciolo believed was deposited in a joint account subject to withdrawal only by joint signatures in the event that Miss Faians was successful in obtaining a visa for him, actually was deposited by Miss Faians in such form that she could and did withdraw it without Caracciolo's countersignature or consent very shortly after its deposit, and appropriated this money to her own use (ff. 615, 633). That because of such conversion on her part Caracciolo's fine of $200 could not be paid in Canada, his incarceration necessarily continued, he did not receive his visa, and thereafter was deported. In this last connection, from Miss Faians' own lips on the hearing below (f. 423) we hear:

> "I had seen the American consul and had seen the Canadian authorities and they probably would have arranged to have Mr. Caracciolo enter the country legally according to my efforts, but something else developed in the same case which prevented him from coming into the country, which is outside of the Van Riper question, * * *"

Had this fine been paid Caracciolo immediately would have been released, and undoubtedly would have received his visa from the American Consul so that he could reenter the United States lawfully for permanent residence, because Caracciolo's case, without question, was of the type accorded favored treatment by both the State and Labor Departments as "hardship cases". The fine was not paid (f. 633).

Although Miss Faians had knowledge of the above charges, in her answering affidavit of October 7, 1939 (f. 754), she did not deny same. She, too, was an officer of the Court, and her honesty and veracity had been directly challenged.

Petitioner's application to reopen the hearing to give further evidence, and particularly to give Miss Faians an opportunity to recant, was summarily denied by Judge Knox from the bench (f. 768) with the statement:

> "* * * I cannot keep on holding this matter in abeyance forever. It has been on here now for four or five years."

The denial of the application was as arbitrary as Judge Knox's quoted statement. The previous proceeding had resulted in a reversal of the District Court and petitioner's vindication by the Circuit Court of Appeals. This proceeding was instituted by the affidavit for order of arrest, dated May 6, 1939, and the judgment was rendered herein October 9, 1939.

The foregoing clearly shows that the events transpired after petitioner's conditions of probation had ceased to be in force, and that the charges are totally unsupported by any competent, credible evidence of wrong-doing on his part.

Specification of Errors to Be Urged

The errors which petitioner urges as ground for reversal of the judgment of the Circuit Court of Appeals for the Second Circuit are:

1. It erred in affirming the judgment of the District Court.
2. It erred in holding that a District Court could vacate an imposed sentence, a final judgment, and impose a new one after the term of court had expired.
3. It erred in holding that a probationer may be arrested after the expiration of the maximum period of probation under the sentence and permitted by the statute, and of the maximum period for which the probationer originally might have been sentenced.
4. It erred in holding that a District Court could enforce a judgment imposed under an invalid indictment.

Reasons for Granting the Writ

1. The judgment of the Circuit Court of Appeals, herein, presents an important question of Federal law which has not been, but should be, settled by this Court.
2. Said judgment, if permitted to stand, will serve as authority for subjecting persons sentenced to probation under multiple count indictments to the conditions of probation and arrest and trial without jury for alleged infractions thereof, for the remainder of their natural lives,—in the case of petitioner for 82 years from June 30, 1932,—notwithstanding the Probation Act limits the period of probation to five years.
3. Said judgment holds that a District Court may vavate an imposed sentence, a final judgment, and impose a new one after its term of Court has expired.

In this respect said decision is in direct and open conflict with the following decisions of this court:

Berman v. *U. S.*, 302 U. S. 210, 212;
Cosman v. *U. S.*, 303 U S. 617;
U. S. v. *Mayer*, 235 U. S 55.

And the decision of the Circuit Court of Appeals, Fourth Circuit in *Birnbaum* v. *U. S.*, 107 F. (2) 885.

4. Said judgment decides an important question of general law in a way untenable and in conflict with the statutes.

5. Said judgment is totally unsupported by any evidence.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

JOHN S. WISE, JR.,
Attorney for Petitioner,
135 West 16th Street,
New York, N. Y.

Dated, New York, N. Y., August 31, 1940.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The United States District Court, Southern District of New York, revoked petitioner's probation and his original sentence, execution of which had been suspended, on October 9, 1939, PR, p. 261, with an opinion, p. 201.

The United States Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court on August 12, 1940, with an opinion, PR, pp. 299-303.

Jurisdiction

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and the Act of February 24, 1933, as amended by the Act of March 8, 1934.

Statutes Involved

Sections 1 and 2 of the Probation Act of March 4, 1925, being Sections 724 and 725 of title 18 of the U. S. Code, are printed as an appendix hereto.

Statement

The facts are set forth under the title "statement" in the petition for certiorari at page 2, *ante.*

Argument

In its opinion in *U. S.* v. *Van Riper,* 99 F. (2) 816, 817, the court below found "The Complaint resulting in the revocation of his (petitioner's) probation did not emanate from the probation officer but from the immigration authorities.

A glance at the "Affidavit for Order of Arrest" herein (f. 70) will show that it, too, could have emanated from no source but the immigration authorities.

In *Escoe* v. *Zerbst*, 295 U. S. 490, 493, this Court said:

> "Clearly the end and aim of an appearance before the Court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake *or even downright malice.* He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense. *Burns* v. *U. S., supra* (287 U. S. 216), at pp. 222, 223. It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. *Burns* v. *U. S., supra.* This much is necessary, or so Congress must have thought, *to protect the individual against malice or oppression.*" (Our italics.)

While a practicing lawyer in good standing petitioner had many litigations with the immigration authorities. There is a great mass of testimony, which neither court below has seeen fit to comment upon except in the most casual manner, and an analysis of same shows that there is absolutely no evidence to support the judgment herein. It also may be fairly inferred from the evidence that petitioner has been the victim of malice and oppression on the part of the immigration authorities.

As the evidence shows, all of petitioner's alleged acts would have been deemed proper and in the regular course of business if they had been done by steamship agents or lawyers engaged in the immigration field. In fact, neither court below expressed any criticism of the acts of Mangiaracina, Henderson, Miss Faians, Stewart, Reid or any other person involved in the transactions. Both the State and the Labor Departments, after most searching investiga-

tions, had found all of the aliens involved to be persons of good character, fully eligible for admission into the United States as immigrants, and petitioner had dealt with them honorably.

POINT I

Charges 1 to 5, inclusive, are res judicata under U. S. v. Van Riper, 99 F. (2d) 816.

Charges 1 to 5, inclusive, were fully heard in a prior proceeding before Judge Hulbert and on appeal his order sustaining the charges and revoking petitioner's probation was reversed. No application for certiorari was made, the time therefor has expired and that decision of the court below stands as the law of the case as to these charges.

POINT II

Charges 6, 7, 8 and 9, inclusive, are not supported by any credible evidence, and they relate to matters subsequent to June 29, 1937, when the conditions of probation ceased to have force and effect.

As to charge 6, Judge Knox, without foundation therefor in the record, arbitrarily undertook to say that petitioner had "lied", not before Judge Knox in these proceedings, but in March, 1938 in the proceedings before Judge Hulbert which resulted in petitioner's vindication by the court below, 99 F. (2) 816.

The record in neither proceeding sustains the finding of Judge Knox.

Petitioner's period of probation, and its conditions, terminated June 29, 1937. He did not lie before Judge Hulbert in 1938, but if he had done so his act would not have constituted a violation of the conditions of probation, because they had previously terminated and had no further force and effect. Such act would have been "perjury" and petitioner, similarly to every other individual, would have been subject to indictment and trial by jury.

As to charge 7, the government neither showed nor attempted to show that there was any irregularity, impropriety or illegality connected with any matter wherein petitioner rendered occasional assistance to Goldsmith's secretary in his absence. The New York State courts had found Goldsmith's business a lawful and not a criminal one and petitioner would have had a right to associate himself in that business had he seen fit to do so. Especially is this so in the light of the fact that the matters occurred after June 29, 1937, when petitioner's conditions of probation ceased to have force and effect.

As to charge 8, our foregoing statement of facts is pregnant with evidence and logic that Sylvia and Esther Rosenberg were by their own admissions criminals and perjurers and that instead of finding "no reason to doubt" their testimony, Judge Knox should have disregarded it entirely and taken steps to see that they were brought to bar for their wrong-doing. Their testimony lacked corroboration, *U. S.* v. *Isaacson,* 59 F. (2) 966. The Rosenberg matter also transpired long after June 29, 1937, the termination of the probation period.

As to charge 9, same is attempted to be sustained by the uncorroborated testimony of Miss Faians that appellant told her he had gone to Toronto. No witness or document sustains her in this statement. On the contrary, in an attempt to sustain this charge, the Government produced Exhibit 1 (improperly admitted in evidence) which corroborates petitioner and shows that he did not go into Canada but stopped at Buffalo. Furthermore, petitioner denied that he had gone into Canada, that he had "said" to Miss Faians that he had gone into Canada and that he had done anything other than to take Caraciollo to a relief worker in Buffalo and leave him there.

As shown, the Government offered in evidence over petitioner's objection and Judge Knox improperly took into consideration Exhibits 1 and 2 in rendering his opinion herein. These documents were created in ex parte proceedings at which petitioner was not present and, hence, the objection to their admission should have been sustained. Apparently no attempt was made by the Government to call as a witness Caraciollo, the man who signed and swore to the affidavit, Exhibit 1. Petitioner is not mentioned in Exhibit 2. Petitioner therefore was deprived of all benefit of cross examination. See *U. S.* v. *Svarney*, 7 F. (2) 515. Also *U. S.* v. *Van Riper*, 99 F. (2) 816, in which it was said:

> "While a probationer is not entitled to a formal trial, he is entitled to a hearing and to have the conclusions upon which the court acts based upon relevant proven facts. The decision must not rest upon whim or caprice, or suspicion of conduct not proven. *Escoe* v. *Zerbst*, 295 U. S. 490; *Burns* v. *U. S.*, 287 U. S. 216, 222; *Campbell* v. *Aderholt*, 36 F. (2) 366, 367."

The objection was duly taken (ff. 142-146) and Judge Knox left these exhibits as marked for "Identification". Throughout the hearing it was properly assumed by petitioner that they were not in evidence, and for this reason made no attempt to controvert them. At folio 427 Judge Knox merely stated "I will take them subject to passing on their validity", and his opinion indicates that *after the hearing* he reached the conclusion that they were "evidence" and so considered them. Thereupon it became important that petitioner overcome any improper inferences that might be created by said exhibits and on lengthy, convincing papers and exhibits (pp. 204-248) he moved to reopen the hearing so as to produce documentary evidence and living witnesses having no interest in or connection with these proceedings (Mr. Reynolds of the Bar Association and officials of the Immigrant Industrial Savings Institution and their documents) to show that the contention of Miss Faians was not founded in truth, that Caracciolo's difficulties arose in the main from her misuse of his funds,

etc. Said moving papers and exhibits show not only that Miss Faians' testimony was untrue but also that she had ample motives for misstating facts. In part because of her handling of the funds and other details of the Caracciolo case, and for other reasons not connected with petitioner, charges of misconduct had been presented against Miss Faians to the Bar Association. She took the path of least resistance.

Had these proceedings been a formal trial, it would have been a gross abuse of discretion for Judge Knox to deny a motion to reopen and continue same prior to entry of judgment. Under the above-quoted rule in *U. S.* v. *Van Riper,* we believe it was equally an abuse of discretion and unfair to have denied the motion in the instant proceedings.

Further, the Caracciolo matter transpired after June 29, 1937, when the probation conditions ceased to have force and effect, and could not have constituted violation of probation.

If the government officials believed a crime had been committed they should have caused the indictment of petitioner and any other person connected therewith.

POINT III

The District Court had no jurisdiction in May, 1939, to make an order and warrant for petitioner's arrest, because both the probation period and the imposed sentence, execution of which was suspended, had previously terminated under the express provisions of the sentence and the statute.

In its opinion herein, PR, p. 299, the Circuit Court of Appeals found that petitioner:

> "Was not arrested, however, during the original probationary period but was arrested and given his hearing within the period for which he might have originally been sentenced."

This does not accord with the facts. On June 30, 1932 Judge Knox definitely imposed eight concurrent five year sentences under counts 9 to 16, inclusive, of the indictment, to commence at expiration of service of sentences imposed on counts 1 to 8, inclusive, and 17, suspended execution thereof, and provided that the sentence was "to date from June 30, 1932," PR, pp. 9-10. As an imposed sentence it was a final judgment and constituted the sole, specific and maximum penalty that ever could be exacted from petitioner under said counts,—it was, in the language of the probation statute, "the maximum period for which the defendant might originally have been sentenced" in the judgment of the sentencing court. The probation period terminated June 29, 1937, and the sentence, execution of which was suspended, terminated by lapse of time on or before August 28, 1938, as hereinafter shown. Therefore, on May 6th and 8th, 1939, respectively, the District Court had no power to make an order and warrant for petitioner's arrest, because Section 725 of Title 18, U. S. Code limits that power to the probation period and

> "Any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced."

Most certainly said "maximum period" is not to be determined by aggregating the penalties possible under the several counts of an indictment,—a defendant is not sentenced under the indictment but under the judgment of conviction, the sentence. In imposing sentence, final judgment, the trial judge once and for all time evaluates the gravity of the offenses charged in the indictment and determines the maximum degree of punishment to be exacted therefor.

The opinion of the court below, PR, p. 299, also states:

> "It has been argued that the court was without power to vacate the suspension of execution of the original sentence after the period of probation had expired and to resentence, but that contention is unsound for the reasons stated in *U. S.* v. *Moore,* 101 F. (2) 56."

Petitioner did not so argue. He argued that both the period of probation and the period of the sentence, execution of which had been suspended, had terminated by their express terms and those of the statute, and that, therefore, there remained no sentence which the court had jurisdiction to put into execution by vacating its suspension. Most certainly it could not vacate the originally *imposed* sentence, a final judgment, and impose a new one, because its court term long since had expired, *Berman* v. *U. S.,* 302 U. S. 210, 212; *U. S.* v. *Mayer,* 235 U. S. 55. We need not discuss *U. S.* v. *Moore,* 101 F. (2) 56, cited by the court below, because that case looks for its authority directly to the decision of this Court in *Frad* v. *Kelly,* 302 U. S. 312.

Frad v. *Kelly* is not in point, because it does not deal with a case like the one at bar in which the court imposed a definite sentence, a final judgment, and suspended its *execution.* In that case the court suspended *imposition* of sentence, as in *Miller* v. *Aderhold,* 288 U. S. 206.

The Frad case presented only two questions:

1. Whether or not, after returning to his own district, a Judge properly could act with respect to a case which had come before him in another district where he previously had sat by special designation?

Both this Court and the court below answered that question in the negative.

2. Whether or not a court could impose a sentence to be served under one indictment, suspend *imposition* of sentences under two other indictments, and impose probation?

Both this Court and the court below answered that question in the affirmative.

Nothing in the Frad case can be construed to mean that an imposed sentence, a final judgment, can be vacated and a new one imposed after the expiration of the term of court, or that placing the defendant on probation affects the finality of the judgment. In fact, in harmony with all other decisions of this Court on the subject, its Frad opinion contains the statement:

> "A criminal case is concluded by the judgment of sentence entered upon a plea or a verdict of guilt."

This Court decided the Frad case on December 6, 1937, and on the same day it decided *Berman* v. *U. S.*, 302 U. S. 210, 212, in which it held:

> "Petitioner was convicted and sentenced. Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold,* 288 U. S. 206, 210; *Hill* v. *Wampler,* 298 U. S. 460, 464. Here the imposition of sentence was not suspended, but only its execution. The sentence was not vacated. It stood as a final determination of the merits of the criminal charge. To create finality it was necessary that petitioner's conviction should be followed by sentence (*Hill* v. *Wampler, supra*) but when so followed the finality of the judgment was not lost because execution was suspended. In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits,' and 'leaves nothing to be done but to enforce by execution what has been determined' *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 280, 283; *Heike* v *United States,* 217 U. S. 423, 429.
> * * * Placing petitioner on probation did not affect the finality of the judgment."

Two months thereafter, in February, 1938, this Court decided *Cosman* v. *U. S.*, 303 U. S. 617. Cosman had been sentenced in July, 1935 to 14 months' imprisonment under one count of an indictment, to three concurrent sentences of two years each under three other counts of the same indictment, with execution suspended, and to two years probation.

After his release from imprisonment under said first count, Cosman was arrested November 7, 1936 for violation of his probation. The probation revocation hearing came on before Judge Caffey in the Southern District of New York on July 9, 1937 and was adjourned.

On December 16, 1937 it again came on before Judge Caffey, and Assistant U. S. Attorney Shears stated to the Court:

> "The case came on for hearing of the violation of probation on July 9th, and at that time the United States Attorney moved for sentence under the rule of the two cases of *United States* v. *Greenhaus,* 85 F. (2) 116, and 89 F. (2) 634. Counsel for the defendant * * * requested that the commitment be adjourned until December 9th, 1937, to await the ruling in the Supreme Court of the case of *Frad* v. *Kelly,* 89 F. (2) 866, certiorari granted June 1, 1937.
>
> Your Honor adjourned the commitment as requested * * *.
>
> On December 6, 1937, the Supreme Court decided the case of *Frad* v. *Kelly,* affirming the Circuit Court of Appeals for the Second Circuit. However, the opinion carefully refrained from mentioning *United States* v. *Greenhaus* * * *."[1]

---

[1]In the *Frad* case, 89 F. (2) 866, May 10, 1937, affirmed by this Court, 302 U. S. 312, December 6, 1937, the Circuit Court of Appeals had said: "*United States* v. *Greenhaus,* 85 F. (2) 116, certiorari denied November 17, 1936, 57 S. Ct. 192, held that, where there are sentences upon several counts in a single indictment, the suspension of a sentence to begin at the termination of a prior one is unlawful, and hence an order of probation is invalid and execution of the sentence may be ordered. That rule does not apply to indictments which are separate and not consolidated."

"The Government must take the position, without more specific language as to the Greenhaus cases, that the Greenhaus case is binding upon this court, and upon the Government at this time in connection with this particular sentence. Consequently the Government renews its motion to recommit.

I will read exactly the Government's motion at this time: To vacate the suspension of execution of sentence and the probation imposed on counts two, three and four of indictment C. 97-11, and to order execution of the sentence heretofore imposed on the defendant, Nathan Cosman, of two years on each of these counts, to run concurrently, the defendant to be given credit on the execution of said sentence for two years for the time which elapsed between his release from the United States Penitentiary on June 8, 1936, and July 9, 1937, the stipulated date on which the commitment was to be considered effective. * * *

The Court: As I stated to you, I feel compelled by the ruling in the Greenhaus case to vacate the suspension of execution of the two year sentence that was imposed in this court on July 1, 1935, and probation of two years which accompanied that sentence. That forces me, therefore, to require the service of that sentence less credit of a period equal to that between June 8, 1936, and July 9, 1937. That would be less thirteen months and one day * * *."

On January 10, 1938, 94 F. (2) 1020, the Circuit Court of Appeals affirmed Judge Caffey's said order "on authority of *U. S.* v. *Greenhaus,* 85 F. (2) 116, certiorari denied 299 U. S. 596".

On February 7, 1938, *Cosman* v. *U. S.,* 303 U. S. 617, this Court reversed said decisions of the courts below:

"Per Curiam: The motion for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is also granted, and the judgment is reversed. Frad v. Kelly, 302 U. S. 312."

Thereby this Court held in effect that it was and is lawful for District Courts to impose sentences, final judgments, with execution suspended, to follow service of a sentence

under another count of the same indictment, as was done in the cases of Greenhaus, Berman, Cosman and this petitioner, which final judgments cannot be vacated after the expiration of the term of the court at which they are imposed, *U. S.* v. *Mayer,* 235 U. S. 55.

The Fourth Circuit Court of Appeals in *Birnbaum* v. *U. S.,* 107 F. (2) 885, 886, Dec. 2, 1939, states:

> "An order suspending sentence and releasing a prisoner on probation is in no sense a final decision. It is a mere deferring of sentence, which in a criminal case is the final judgment. * * * When the sentence is imposed and merely its execution suspended, there is a final judgment not subject to change by the court;"

The statute, 18 U. S. C. 724 specifically limits the period of probation, and the effectiveness of the conditions of probation, by stating that "The period of probation, together with any extension thereof, shall not exceed five years".

The next succeeding section, 18 U. S. C. 725, expressly provides that, for a violation of the conditions of probation, the probationer may be arrested at any time within the probation period or "at any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced".

Sections 724 and 725 of Title 18, U. S. C., are Sections 1 and 2 of the Act of March 4, 1925, c. 521, 43 Stat. 1259-60. As parts of the same act they must be read and construed together and in harmony with each other. Therefore, under 18 U. S. C. 725, in a timely proceeding, the Court has power:

> (If imposition of sentence was suspended) "to revoke the * * * suspension of sentence, and may impose any sentence which might originally have been imposed." *Miller* v. *Aderhold,* 288 U. S. 206.
>
> (If execution of an *imposed* sentence was suspended) "to revoke the probation" and, under *Berman* v. *U. S., supra,* automatically " 'enforce by execution' the said *imposed* sentence, execution of which was suspended."

In other words, while Section 725 gives the court power to revoke "probation" OR the "suspension of sentence", nothing in said section gives it power *to vacate an imposed sentence, a final judgment, and impose a new one.* In the instant case both the five year term of the imposed sentence, and the maximum five year period of probation, had terminated long prior to the institution of this proceeding on May 6, 1939, as aforesaid, and there remained no sentence which could be executed.

POINT IV

Under the sentence of June 30, 1932, the period of probation ended June 29, 1937, and the imposed sentence, execution of which was suspended, ended August 28, 1938.

On December 4, 1916 in *Ex Parte United States,* 242 U. S. 27, this Court condemned indefinite suspension of sentences, held that District Courts had no power to suspend the imposition or execution of sentences, and that they could have no such power unless and until Congress should grant same by legislation.

March 4, 1925 Congress enacted the Probation Act, 18 U. S. C. 724-725.

January 3, 1928 this Court in *U. S.* v. *Murray,* 275 U. S. 347, held that probation could not be imposed to follow incarceration, on the theory that the incarceration would defeat the purposes of the Probation Act, *i. e.,* to keep first offenders from contacting hardened criminals.

June 20, 1932, just prior to petitioner's sentence by Judge Knox, the Ninth Circuit Court of Appeals decided *Burns* v. *U. S.,* 59 F. (2) 721 (affirmed 287 U. S. 216), and upheld a sentence of one year on one count, a fine on a second count and a five year sentence with execution suspended on a third count, with probation to run during and beyond the imprisonment under the first count.

June 30, 1932, the District Court, Knox, J., sentenced petitioner (ff. 25-29):

> "Count one to eight inclusive—Three years on each count to run concurrently. Count 17—Two years to run concurrently with counts one to eight, inc. Counts nine to sixteen—Five years on each count to run concurrently and to commence at the expiration of sentences imposed on counts 1 to 8 inclusive and count 17. Sentence on counts 9 to 16, inc. suspended. Defendant placed on probation for a period of five years. Sentence to be executed at a penitentiary to be designated by the Attorney General. Atlanta, Ga. Sentence to date from June 30, 1932."

Thereby Judge Knox imposed a definite sentence under each and every count of the indictment, a final judgment. In stating that the sentence was from June 30, 1932 Judge Knox then intended to and did fully exhaust his powers under the applicable statutes, as he and every other District Judge then understood them, because it then was the general belief that *U. S.* v. *Murray, supra,* precluded sentence to a period of probation to follow a period of incarceration, even though *Burns* v. *U. S., supra,* countenanced probation running concurrently with and beyond imprisonment.

In other words, the probation period commenced June 30, 1932 and terminated June 29, 1937. The five year sentence, execution of which was suspended, commenced upon petitioner's release from incarceration August 29, 1933 and, at the latest, terminated August 28, 1938.

After the court below vindicated petitioner in 99 F. (2), 816, in which assigned error number seven claimed June 29, 1937 as the termination of the probation period (99 PR, f. 783), the Government on December 12, 1938 unsuccessfully attempted to procure from Judge Coxe an order:

> "that the probation of the defendant is reinstated and that he is placed on probation for the remainder of the probationary period ordered in his original sentence."

On March 31, 1939, Judge Hulbert duly

> "ORDERED, that the period of probation of the defendant Harold Van Riper having terminated, he is hereby discharged from any and all further supervision by the probation officer of this court."

The Government did not appeal from Judge Coxe's refusal to continue petitioner's probation or from Judge Hulbert's order formally terminating it and, hence, as the law of this case it is established that petitioner's probationary period was formally terminated June 29, 1937 by an order dated March 31, 1939 stating that same had expired prior to its date.

At no time in the instant proceedings, although the question was repeatedly raised, did Judge Knox question the fact that the probation period had terminated June 29, 1937. He rested for his authority to carry on the proceeding after the probation period had terminated solely on *Moore* v. *U. S.*, 101 F. (2) 56, and so stated, PR, f. 115, and, as shown, it is not in point.

In view of all the foregoing, there was no authority in the probation officer on May 6, 1939 to institute these proceedings.

POINT V

The indictment was invalid and the Court was without jurisdiction to impose judgment and sentence.

Immediately upon the opening of the hearing on June 6, 1939 petitioner challenged the Court's jurisdiction to proceed (PR, ff. 120-121), on the ground that indictment C-88-665, May 25, 1932, showed on its face that, in view of the provisions of the Naturalization Act of June 29, 1906, 8 U. S. C. 373, 379, 380 and 414, it was impossible that the offenses charged therein could have been committed at any time prior to the date of said indictment, May 25, 1932.

Said question was previously before the courts below in *U. S.* v. *Van Riper,* 92 F. (2) 1020, but inasmuch as it went to the jurisdiction of the court, a question always open, it was again raised. The District Court ignored it in its opinion herein (PR, ff. 603-606). The Court below did not rule that it was *res judicata,* but merely stated in its opinion (PR, p. 299), that the contention was unsound in view of *Latgis* v. *U. S.,* 97 F. (2) 588.

This Honorable Court denied certiorari, 58 S. Ct. 521, in *U. S.* v. *Van Riper,* 92 F. (2) 1020, and, in the absence of a ruling by it as to whether or not said question is *res judicata,* we merely refer to the record and briefs therein and point out that in the Latgis case the court did not have presented to it and consider the questions raised by petitioner. Also, that the penal and other provisions of the Naturalization Act of June 29, 1906, and similar provisions of earlier statutes had been in force more than a century prior to the Fried case of 1935, wherein the Government's brief stated:

> "It is true there is no reported case refuting the defendant's contention and sustaining the Government on the question at bar." (R92, f. 220.)

Conclusion

It is respectfully submitted that the petition should be granted as prayed for.

JOHN S. WISE, JR.,
Attorney for Petitioner,
135 West 16th Street,
New York, N. Y.

APPENDIX

Pertinent Statute

Section 724, Title 18, U. S. C.

724. *Suspension of imposition or execution of sentences and placing of defendant upon probation; power of courts; revocation or modification of probation; duties of probationer.*—The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible. (Mar. 4, 1925, c. 521, § 1, 43 Stat. 1259.)

Section 725, Title 18, U. S. C.

725. *Same; powers of probation officers; arrest of probationer.*—When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed. (Mar. 4, 1925, c. 521, § 2, 43 Stat. 1260; as amended June 16, 1933, c. 97, 48 Stat. 256.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 439

HAROLD VAN EATON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

John S. Wise, Jr.,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 439

HAROLD VAN RIPER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

This Honorable Court denied certiorari herein on November 12, 1940, and rehearing is respectfully prayed for because the decision below, unless rationalized by this Court, will stand as authority for the proposition that a District Court may issue a warrant and arrest a former probationer for alleged probation violation, not crime, after he has fully served the maximum five year period of probation permitted by the Probation Act; after the expiration of the imposed, concurrent five year sentence, execution of which was suspended; after he has been duly discharged from said probation and sentence by its formal order on notice and argument; and after the time to appeal said order of discharge has passed and it has become res judicata. If this be law, then no order of a District Court in

any proceeding, under the Probation Act or otherwise, can have any degree of finality or afford one whit of protection to any litigant.

This petitioner had an honorable career as a lawyer for more than a quarter century, and was a veteran of the World War, prior to his conviction in 1932. Since his release in August, 1933 he never has been charged, indicted or convicted of a crime, and has tried to rehabilitate himself.

The original judgment and sentence herein was imposed by His Honor, Judge Knox, June 30, 1932 under Indictment C-88/665:

> "Count one to eight inclusive—Three years to run concurrently. Count 17—Two years to run concurrently with counts one to eight inc.
>
> "Counts nine to sixteen—Five years on each count to run concurrently and to commence at the expiration of sentences imposed on counts 1 to 8 inc. and 17. Sentence on counts 9 to 16 inc. suspended.
>
> "Deft. placed on probation for a period of five years.
>
> "Sentence to date from June 30, 1932."

Defendant was immediately incarcerated on June 30, 1932 and thereafter the term of court was never extended. The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte* Lange, 18 Wall. 163.

As recently as December 2, 1939 the Fourth Circuit Court of Appeals, in *Birnbaum* v. *U. S.*, 107 F. (2d) 885, 886, resting squarely upon recent decisions of this Honorable Court, held:

> "(1, 2) An order suspending sentence and releasing a prisoner on probation is in no sense a final decision. It is a mere deferring of sentence, which in a criminal case is the final judgment. 'Final judgment in a criminal case means sentence.' Berman *v.* United

> States, 302 U. S. 211, 212, * * * Miller *v.* Aderhold, 288 U. S. 206, 210, * * *. When the sentence is imposed and merely its execution suspended, there is *a final judgment not subject to change by the court;* and appeal will thereupon lie, Berman *v.* United States, *supra.* But *until sentence is imposed,* the whole matter of punishment rests in the court's discretion. * * *'' (our italics).

Therefore, on June 30, 1932, petitioner was told, in effect, that he would have to serve the three year sentence, that if he behaved himself for five years thereafter, the maximum period of probation permitted by the Probation Act, he would never have to serve the consecutive five year sentence then and there imposed with execution suspended, and that after completing said probation he could freely mingle with his fellow-men and, like them, be subject only to the laws of society, not the rules of probation, in his struggle for livelihood.

Petitioner was incarcerated under that three year sentence from June 30, 1932, until August 29, 1933, when he was released on a parole which he creditably performed.

In April, 1937, a probation revocation proceeding was instituted against petitioner before His Honor, Judge Hulbert, who later revoked probation, but petitioner's appeal therefrom resulted in an adjudication in his favor, on the merits and facts, by the Second Circuit Court of Appeals, 99 F. (2d) 816, November 7, 1938, and the Government did not apply for certiorari.

In March, 1939, both said period of probation and the period of the imposed concurrent five year sentence, execution of which had been suspended, having previously terminated, petitioner, on affidavit and notice to respondent, duly moved the District Court to exercise its authority under the first paragraph of Section 2 of the Probation Act (18 U. S. C. 725) and make an order formally discharging peti-

tioner from probation, (R. 13-19), and respondent filed an answering affidavit (R. 19). Thereafter said motion was argued orally before Judge Hulbert, who, on March 28, 1939, rendered a memorandum opinion (R. 23):

> "Having previously determined that defendant's parole would expire August 29, 1938, and adding thereto the period that the stay granted by the Circuit Court of Appeals was effective, the probationary period has terminated and the motion is granted."

and who, on March 31, 1939, ordered:

> "That the period of probation of the defendant Harold Van Riper having terminated, he is hereby discharged from any and all further supervision by the probation officer of this Court."

Said order was duly filed, the Government did not appeal it, it never has been vacated and it is *res judicata.*

Therefore, after March 31, 1939, at the latest, petitioner was free of the conditions of probation and subject only to indictment and trial by jury under the Constitution, the statutes and the rules of evidence for infractions of the law of the land. This is emphasized by the fact that under the Probation Act the court "may issue a warrant and cause the defendant to be arrested and brought before the court" only within the probation period or "after the probation period, but within the maximum period for which the defendant might originally have been sentenced." As shown above, the sentence of June 30, 1932, was a definitely imposed final judgment, it was single, and, the litigation having been terminated by such final judgment, it represented the maximum period for which petitioner ever could be sentenced in that litigation. As Judge Hulbert held, that period had terminated prior to March 31, 1939.

May 8, 1939, long after the termination of the five year periods of the probation and the sentence, execution of

which had been suspended; and after Judge Hulbert's said formal order discharging petitioner on the basis of such terminations, Judge Knox exceeded his power and issued the warrant for petitioner's arrest for alleged violation of said expired probation, which is the subject of petitioner's present attack. Said warrant was based upon a petition, also dated May 8, 1939, which did not mention petitioner's previous discharge from probation by Judge Hulbert.

Petitioner immediately surrendered voluntarily and moved to dismiss the proceeding (R. 31) as barred by his said formal discharge from probation by Judge Hulbert on the basis of the previous termination of the probation period and the period of the sentence, execution of which had been suspended. Judge Knox, however, denied that motion (R. 39), citing *U. S.* v. *Moore*, C. C. A. 2, January 16, 1939, 101 F. (2d) 56, as binding upon him. Here we have one judge of a District Court utterly disregarding a previous solemn, valid order duly made by another judge of the same court. If respondent questioned the legality of Judge Hulbert's said order discharging petitioner, its remedy was by an orderly, timely appeal to an appellate court, not by an unauthorized proceeding before another judge of concurrent jurisdiction. Petitioner himself had previously called Judge Hulbert's attention to the *Moore* case when he moved for his formal discharge from probation (R. 17-18), and Judge Hulbert discharged him despite the *Moore* case.

There is only a surface similarity between the *Moore* case and the instant one. The *Moore* record shows that it dealt largely with the question as to whether or not His Honor, Mr. Justice Van Devanter, had the right to sit in the District Court. It shows that the *Moore* sentence, execution of which was suspended, did not specify the date it was to commence, and, if that was to occur at the termination of a prior sentence under another indictment which Moore then was serving, then "the maximum period for

which the defendant might originally have been sentenced" under the imposed judgment had not terminated when the probation revocation proceedings were instituted against Moore. Further, Moore had never begun to serve any portion of the imposed sentence which fixed probation, and, therefore, the doctrine established by *Ex parte Lange, supra,* might not apply, and jurisdiction over the sentence may have remained with the court. Still further, Moore had not been formally discharged from probation by the court as was petitioner in the instant case. (This Court denied certiorari in the *Moore* case, 306 U. S. 664.)

Any other reasoning throws the decision of the court below in the *Moore* case into open and direct conflict with the decision of this Court in *Berman* v. *U. S.*, 302 U. S. 211, 212, and of the Fourth Circuit Court of Appeals in *Birnbaum* v. *U. S.*, 107 F. (2d) 885, 886, quoted above. The *Birnbaum* case was decided nearly a year after the *Moore* case, with full knowledge of its implications, and follows the doctrine long established by this Court as applicable to cases such as the instant one.

The petition for certiorari herein cites unimpeachable authority for the proposition that sentence once imposed is the judgment, final and inviolable. Respondent has attempted to meet this by arguing that certain final judgments are final for purposes of appeal, but not as to the rights of the parties, which gives us the absurdity of judgments that are final, more final and most final.

Respondent has contended that the period within which petitioner can be arrested under Section 2 of the Probation Act is the maximum consecutive periods for which he could originally have been sentenced under counts nine to sixteen of Indictment C-88/665, to-wit, 40 years. This might possibly be true if the court had suspended *imposition* of petitioner's sentence under said counts, because then the case might have remained open and pending on the docket

of the court until concluded by sentence, *Miller* v. *Aderhold*, 288 U. S. 206, 210.

The court, however, did not suspend imposition of sentence—on the contrary, it definitely *imposed* concurrent five year sentences under each and every one of said counts, and merely *suspended execution* thereof.

Said imposed sentence was a final judgment, and suspending its execution and placing petitioner on probation did not alter its finality. *Berman* v. *U. S., supra.* It was part of a single sentence which provided for prior imprisonment. Petitioner was incarcerated thereunder and the District Court's jurisdiction over the sentence ended June 30, 1932, except for the enforcement of its specific terms, *Ex parte Lange, supra.*

In other words, the consequences of the counts of that indictment were merged into a single sentence calling for a 3 year period of imprisonment to be served, and a consecutive period of five years imprisonment to be served only if petitioner were arrested with or without warrant within the probation period; or, upon warrant, "at any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced". This must limit the right to arrest to the period for which he could have been incarcerated under the final judgment as entered. It cannot mean that he may be arrested at any time within the period for which he might have been sentenced under the statute and the indictment before the final judgment, irrespective of the final judgment entered, and thereupon be given a new and additional sentence.

The Government claims that despite the judgment of conviction herein, and it is sustained, that after the expiration of probation, and even after the expiration of the period of sentence under the judgment, the defendant may be arrested at any time within the period in which he might have been sentenced to incarceration under the statute and the indictment, and be sentenced anew.

If such is the law, instead of realizing the assurance that he would be free after the expiration of the probation and the sentence, execution of which was suspended, he now finds himself subject to arrest and incarceration for a period, in this case, extending way beyond the period of sentence under the judgment.

Such is certainly not the law.

Before the judgment the defendant might have been sentenced upon conviction to numerous periods of time, but when the judgment was entered, that established a finality of the time for his arrest or incarceration to the period specified therein.

The statute does not authorize the court to go behind the judgment. The judgment determines the time of defendant's incarceration and the right of the court to pursue him. The statute does not confer upon the court the right to ignore the time limited by the original judgment and to proceed to impose a new judgment on top thereof.

As shown, on March 31, 1939, Judge Hulbert made a formal order discharging petitioner from probation on the basis of a finding that said periods of probation and sentence had previously terminated. Thereafter, on May 8, 1939, Judge Knox exceeded his power, disregarded said order of discharge and ordered petitioner's arrest in the instant proceeding.

On October 9, 1939, although there had been established against petitioner no act involving moral turpitude or crime, and although he had no power to alter or vacate the imposed sentence of June 30, 1932, Judge Knox (R. 261) resentenced petitioner:

> "For and during the term of Count 9—Eighteen (18) months. Five (5) years on each of counts 10-11-12-13-14-15 and 16 to run concurrently with each other and suspended. Probation for five years to begin at the expiration of sentence on Count 9."

In other words, instead of enforcing the remainder of the originally imposed sentence, execution of which had been suspended, it is imposing a new and additional sentence after the termination of the period of that original sentence, and imposing a new and additional five-year period of probation after the complete service and expiration of the originally imposed five years of probation.

The Probation Act does not permit the maximum period of probation to exceed five years under any sentence (18 U. S. C. 724 as construed by *Burns* v. *U. S.*, 287 U. S. 216). The statute under which counts nine to sixteen were found, 18 U. S. C. 232, does not permit a maximum sentence of more than five years imprisonment.

Neither the sentence of June 30, 1932, nor the sentence of October 9, 1939, has been vacated, they represent double punishment for single offenses, and the situation is pregnant with the very evil which this Honorable Court sought to avoid by its decisions in *Ex parte Lange*, 18 Wall. 163 and *Berman* v. *U. S.*, 302 U. S. 211.

The decision of the court below affirming same is in direct and open conflict with said decisions of this Court and the decision of the Fourth Circuit Court of Appeals in *Birnbaum* v. *U. S.*, 107 F. (2) 885, 886. The facts of the instant case also differ materially with those in the *Moore* case, *supra*. Unless this Court sees fit to intervene, this petitioner will be subject not only to execution of the unlawful sentence herein, but, in addition, to arrest without indictment and trial without jury and benefit of the rules of evidence, for acts which are not crimes, for forty (40) years—more than his life expectancy.

This petition for rehearing is made in good faith and not for purposes of delay.

WHEREFORE, petitioner respectfully prays that this Honorable Court grant this petition for rehearing of his petition

for certiorari, that it grant the prayer of that petition, and that it stay execution of the unlawful judgment complained of inasmuch as his incarceration thereunder is imminent.

And he will ever pray.

Respectfully submitted,

JOHN S. WISE, JR.,
Attorney for Petitioner,
135 West 16th Street,
New York, N. Y.

Dated New York, N. Y., December 6, 1940.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 439

HAROLD VAN RIPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion delivered by the District Judge in connection with the revocation of petitioner's suspended sentence is not reported, but appears at R. 201–202. The opinion of the Circuit Court of Appeals (R. 299–301) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 12, 1940 (R. 301). The petition for a writ of certiorari was filed September 16,

1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the District Court had power to revoke the petitioner's suspended sentence and resentence him after the period for which he was placed on probation had expired, but within the maximum period for which he might originally have been sentenced.

2. Whether the District Court abused its discretion in revoking the petitioner's suspended sentence and resentencing him.

3. Whether the counts of the indictment upon which the petitioner was given a suspended sentence sufficiently charged offenses to enable the District Court to impose a new sentence upon vacating the suspended sentence.

STATUTE INVOLVED

Section 2 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259, 1260, as amended June 16, 1933, c. 97, 48 Stat. 256 (U. S. C., Supp. V, Title 18, Sec. 725), so far as pertinent, reads:

* * * * *

> At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant,

> or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

On June 16, 1932, the petitioner pleaded guilty to an indictment, in seventeen counts, in the United States District Court for the Southern District of New York (R. 3).[1] Counts 1 through 8 charged violations of Section 23 of the Naturalization Act (U. S. C., Title 8, Sec. 414); Counts 9 through 16 charged subornation of perjury (Criminal Code, Sec. 126; U. S. C., Title 18, Sec. 232); and Count 17 charged a conspiracy to violate the Naturalization Act. On June 30, 1932, petitioner was sentenced on Counts 1 through 8 to three years' imprisonment on each count, to run concurrently; on Count 17 to two years' imprisonment, to run concurrently with

[1] While this indictment is not included in the transcript of record of the instant case, it appears on pages 7–47 of the transcript of record entitled Petitioner's Exhibit "B" on file with the Clerk of this Court.

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the sentence imposed under the first eight counts; and on Counts 9 through 16 to five years' imprisonment on each count, to run concurrently and to commence at the expiration of the sentence imposed under Counts 1 through 8 and 17. However, sentence on Counts 9 through 16 was suspended and petitioner was placed on probation for a period of five years (R. 9). The probation was to begin at the expiration of the sentence imposed on Counts 1 through 8 (R. 293). The petitioner was incarcerated until August 29, 1933, at which time he was released on parole (R. 14).

In October, 1934, petitioner sought an order directing the Government to show cause why he should not be permitted to withdraw his plea of guilty and enter a plea of not guilty, and why the judgment of conviction should not be vacated and set aside. An order to show cause issued, and later, on January 16, 1935, petitioner made a further motion to set aside the judgment of conviction. These motions were denied on February 16, 1935. Over two years later, on June 21, 1937, petitioner moved for reargument of his previous motions, contending, *inter alia,* that no count of the indictment alleged facts sufficient to constitute an offense (R. 4–5, 299–300).[2] This motion was denied (R. 5,

[2] These motions, the supporting affidavits, and orders appear on pp. 20–93 of the transcript of record in *United States* v. *Van Riper*, 92 F. (2d) 1020 (C. C. A. 2d), on file with the Clerk of this Court as an exhibit in the instant case.

300), the order of denial was affirmed by the Circuit Court of Appeals for the Second Circuit in a *per curiam* decision, without opinion (*United States* v. *Van Riper,* 92 F. (2d) 1020), and this Court denied a petition for writ of certiorari (*Van Riper* v. *United States,* 303 U. S. 635). On May 13, 1938, the probation of petitioner was revoked by the District Court (R. 6, 300), but on appeal the order of revocation was reversed by the Circuit Court of Appeals for the Second Circuit on the ground that the Government's evidence was insufficient (*United States* v. *Van Riper,* 99 F. (2d) 816). Thereafter, by an order of the District Court dated March 31, 1939, the petitioner's period of probation was declared terminated and he was discharged from further supervision by the probation officer (R. 23).

On May 8, 1939, the Chief Probation Officer filed in the District Court an affidavit requesting that a warrant issue for the petitioner's arrest and that the suspended sentence be revoked on the grounds that the petitioner had associated with an undesirable person, had left the jurisdiction of the court without the permission of the probation officer on several occasions, had misrepresented himself to the Canadian immigration authorities as an attorney at law, had made a false statement to the probation officer as to the purpose of a trip to Cuba, had procured the smuggling into Canada of various aliens who were illegally in the United States, had

testified falsely at his previous probation revocation hearing, and had counseled and advised the making of false statements in an immigration matter and had prepared false affidavits in such matter (R. 6, 24–27). An order for petitioner's arrest issued (R. 28) and, after a hearing at which was introduced the testimony both of Government witnesses and of the petitioner (R. 40–200), the District Court filed an opinion holding that the proof was sufficient to justify revocation of the suspended sentence (R. 201–202). The District Court, accordingly, on September 8, 1939, entered an order revoking this suspended sentence (R. 203), and on October 9, 1939, imposed a sentence upon the petitioner of eighteen months imprisonment on Count 9 and five years' imprisonment on each of Counts 10 through 16, the latter terms to run concurrently and to be suspended, probation for a period of five years beginning at the expiration of the sentence on Count 9 (R. 261). On appeal this judgment was unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 299–301).

ARGUMENT

I

Petitioner urges that the District Court had lost jurisdiction in 1939 to revoke his suspended sentence and impose a new sentence under Counts 9 through 16, because the probationary period had

expired. But in *United States* v. *Moore,* 101 F. (2d) 56, the same situation existed, and the court below held that under Section 2 of the Probation Act (*supra,* pp. 2–3) the District Court had supervisory control over the probationer until the expiration of the maximum period for which the probationer might originally have been sentenced and could within that period, for good cause, vacate the suspended sentence and resentence the probationer. The court held to be without merit the contention that Section 2 differentiates between those cases in which the imposition of sentence is suspended and those in which the execution of sentence is suspended. A petition for writ of certiorari attacking these holdings was denied. *Moore* v. *United States,* 306 U. S. 664.

Here, as in the *Moore* case, the order vacating the suspended sentence and the judgment resentencing the petitioner were beyond question entered within the maximum period for which the petitioner might originally have been sentenced.[3]

---

[3] When the petitioner received a suspended sentence in 1932, on Counts 9 through 16, the District Court could have given him a consecutive sentence of five years on each of those counts. It is true that in the case of a multiple-count indictment, such as in the instant case, the defendant will remain under the supervisory control of the District Court for many years beyond the strict probationary period. But the remedy is, of course, with Congress if it is felt that this works an undue hardship upon defendants.

Section 2 of the Probation Act, for the purposes of that statute, abrogates the general rule that a final judgment cannot be amended or set aside after the term at which it is entered. Accordingly, the cases cited by the petitioner, which merely state the general rule or deal with the finality for appellate purposes of a judgment the execution of which is suspended, are not in point.[4]

II

Petitioner contends that the first five of the charges upon which the vacating of the suspended sentence was sought could not be urged under the principles of *res judicata*,[5] and that there was no credible evidence to support the remaining four charges. He, therefore, urges, in effect, that the District Court abused its discretion in vacating the suspended sentence and resentencing him.

It is unnecessary to consider whether the principles of *res judicata* are applicable in a proceeding such as this, since it is manifest from the opinion of the District Court (R. 201–202) that that court did not predicate its decision solely, if at all,

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[4] There can, of course, be no doubt as to the power of Congress to change the general rule for the purposes of the Probation Act. *Scalia* v. *United States*, 62 F. (2d) 220, 222–223 (C. C. A. 1st); *United States* v. *Antinori*, 59 F. (2d) 171, 172 (C. C. A. 5th).

[5] Petitioner relies upon the prior decision in his favor by the court below in *United States* v. *Van Riper*, 99 F. (2d) 816.

upon the first five charges. In its opinion, the court specifically referred only to the charges that the petitioner had lied at the previous revocation hearing, that the petitioner had associated with one who had been convicted of violating the immigration laws, that he was involved in the smuggling into Canada of one Caracciolo, who was convicted and sentenced in Canada for the unlawful entry and subsequently deported, and that he had counseled a certain young woman to make a false affidavit relating to an immigration matter (Cf. the charges contained in affidavit for order of arrest, R. 24–27). If there was evidence to support any of these charges, the District Court cannot be deemed to have abused its discretion. Without attempting to review the evidence as to all of them, it is sufficient that there was abundant evidence to support the last charge. The Government's testimony showed that the petitioner in 1938 told one Sylvia Rosenberg, who had consulted with him with respect to obtaining a visa for her brother, to get a letter that she was regularly employed, even though she had told him that she was not employed (R. 71–72). The evidence showed, further, that petitioner prepared for her signature and that of her mother affidavits containing untrue statements that she was employed, when she was not (R. 73–75, 87–88, 283–286). The letter of employment was obtained for Sylvia Rosenberg through her sister, Esther Rosenberg, substituting Sylvia's name for

her name in the letter (R. 82–84, 287). The District Court stated in its opinion that there was "no reason to doubt" this testimony (R. 202).

While the petitioner urges that the District Court should have disregarded the testimony of Sylvia and Esther Rosenberg as unworthy of belief, the determination of the credibility of witnesses was, of course, a matter peculiarly within the province of the District Judge. *Pritchett* v. *United States,* 67 F. (2d) 244, 245 (C. C. A. 4th).

III

Finally, the petitioner contends that the District Court was without jurisdiction to resentence him because the indictment showed on its face that by reason of the provisions of the Naturalization Act the offenses charged therein could not have been committed at any time prior to the returning of the indictment.

Petitioner does not spell out the argument upon which this contention is based, but apparently relies upon the same arguments which he presented in his petition for writ of certiorari to review the adverse decision of the court below in 92 F. (2d) 1020. These arguments the Government contended in its brief in opposition were without merit and this Court denied the petition for writ of certiorari (303 U. S. 635). If petitioner's contentions can now be considered despite the prior adjudication of the Circuit Court of Appeals, he at least has pre-

sented no new arguments which would require a reconsideration of the sufficiency of Counts 9 through 16, those now involved.

Since petitioner's present attack on the indictment comes not by way of an appeal from the original sentence,[6] but is made in a probation revocation proceeding occurring long subsequent to the entry of a plea of guilty and the original sentence, the indictment is, of course, not subject to the strict scrutiny which might otherwise obtain. Cf. *Hagner* v. *United States,* 285 U. S. 427, 433.

CONCLUSION

The case was correctly decided below, there is presented no important question of Federal law, and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
HUGH A. FISHER,
Acting Assistant Attorney General.
GEORGE F. KNEIP,
FRED E. STRINE,
W. MARVIN SMITH,
Attorneys.

OCTOBER 1940.

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[6] An appeal could have been taken from that judgment (*Berman* v. *United States*, 302 U. S. 211).

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